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Supreme Court, U.S.
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In The Supreme Court of the United States

REGINALD WILKINSON, et al.,

Petitioners,

v.

CHARLES E. AUSTIN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALASKA, ARIZONA, COLORADO, DELAWARE, HAWAII, ILLINOIS, MAINE, MISSOURI, NEBRASKA, NEVADA, OKLAHOMA, OREGON, SOUTH CAROLINA, TEXAS, WASHINGTON, AND THE COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Where state prison officials decide to place a prisoner in a "super-maximum security" facility based on a predictive assessment of the security risk the prisoner presents, but prison regulations create a liberty interest for the prisoner in avoiding such placement, do procedures meeting the requirements specified in *Hewitt v. Helms*, 459 U.S. 460 (1983), satisfy the prisoner's due process rights?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. AN INMATE WHO IS CONSIDERED FOR "SUPERMAX" HOUSING RECEIVES DUE PROCESS IF PRISON OFFICIALS ENGAGE IN AN INFORMAL, NONADVERSARY REVIEW OF THE INFORMATION SUPPORTING THE PLACEMENT, INCLUDING WHATEVER STATEMENT THE INMATE WISHES TO SUBMIT	4
A. Supermax-housing decisions are subjective in nature, considering myriad factors relevant to predicting an inmate's threat to security	4
1. Prisons are inherently dangerous, and they present intractable security challenges	4
2. Many states have established supermax facilities to meet the high-security needs of the nation's most-dangerous prisoners	6
3. Supermax-placement decisions depend on the valuable expertise of prison officials for the identification of inmates who present excessive security risks	9

TABLE OF CONTENTS – Continued

	Page
B. The intrinsic flexibility of the Due Process Clause allows predictive and subjective decisions to be made within the constructs of informal, nonadversary proceedings, especially when important penological interests are implicated	11
C. Because supermax-housing decisions turn on security-risk assessments that are subjective and predictive, due process is satisfied through informal, nonadversary proceedings	15
1. The nature of subjective supermax decisions is identical to the nature of decisions in the parole and administrative-segregation contexts	15
2. The balance of the individual and governmental interests do not warrant a departure from the informal, nonadversary process that is appropriate for subjective, predictive determinations as previously addressed by the Court	19
D. The more-adversary procedures required by the Sixth Circuit are ill matched to subjectively oriented supermax decisions and impose unnecessary burdens on prison administrators	22
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Manzo, 380 U.S. 545 (1965) 11

Austin v. Wilkinson, 204 F. Supp. 2d 1024 (N.D. Ohio 2002) 23

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Bell v. Wolfish, 441 U.S. 520 (1979) 10

Burns v. United States, 501 U.S. 129 (1991) 17

Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886 (1961) 11

Davis v. Scherer, 468 U.S. 183 (1984) 11

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 15

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Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1 (1979) .....*passim*

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Hudson v. Palmer, 468 U.S. 517 (1984)..... 4

Marchesani v. McCune, 531 F.2d 459 (10th Cir. 1976) 4

Mathews v. Eldridge, 424 U.S. 319 (1976).....11, 12, 15

Montayne v. Haymes, 427 U.S. 236 (1976)..... 20

Morrissey v. Brewer, 408 U.S. 471 (1972) 14

Pell v. Procunier, 417 U.S. 817 (1974)..... 11

Procunier v. Martinez, 416 U.S. 396 (1974)..... 10

Sandin v. Connor, 515 U.S. 472 (1995)..... 13, 21

Stefanow v. McFadden, 103 F.3d 1466 (9th Cir. 1996) 6

TABLE OF AUTHORITIES – Continued

Page

United States v. Santiago, 46 F.3d 885 (9th Cir. 1995) 6

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Jennifer Warren
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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF THE *AMICI CURIAE*

One of the essential functions of states is to securely house criminals in a manner that will protect not only the public, but also prison staff and inmates within the close and dangerous confines of prison. In order to fulfil this difficult responsibility, many states have created super-maximum-security housing for their most-dangerous prisoners, who are identified based on an evaluation of myriad factors concerning their inmate history, as well as a thorough understanding of the inherent dangers of prisons. In this respect the decision to place an inmate in "supermax" housing is both subjective and predictive, based on officials' expertise in managing prisons and their keen awareness of the highly volatile prison atmosphere.

The *amici* states object to the Sixth Circuit's imposition of formalistic and unduly burdensome procedures onto these determinations. The Due Process Clause's intrinsic flexibility allows these decisions to be made appropriately and efficiently through informal, nonadversary review, as this Court deemed constitutionally sufficient in the parole-suitability context, *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), and in security-based administrative segregation decisions, *Hewitt v. Helms*, 459 U.S. 460 (1983). Informal, nonadversary procedures prevent the unnecessary encumbering of correctional administration. And they steer the focus of supermax hearings away from particular factual disputes and onto the more-important inquiry: whether an inmate's overall history, attitude, and associations with other inmates indicate an excessive security threat.

SUMMARY OF THE ARGUMENT

Super-maximum-security facilities have become common among the states over the last twenty years, as part of a response to the serious danger that some of the nation's most-violent prisoners pose to the security of general-population prisons. These facilities provide a very high degree of control and allow the employment of specially crafted security measures in order to stem the opportunities for inmates to use violence against prison staff and other inmates.

The decision to place an inmate into supermax housing for predictive, non-punitive security reasons is necessarily subjective in nature. Officials may take into consideration many different factors, including: the nature of the commitment offense; the inmate's complete prison record, attitude, and associations with other inmates (including any gang associations); and the current atmosphere of the prison. Then a determination is made whether the inmate presents such a high threat to safety that he cannot be housed in traditional high-security facilities.

The intrinsic flexibility of the Due Process Clause allows subjective and predictive decisions like those here to be made within the constructs of informal, nonadversary proceedings—especially when important penological interests are at issue. Indeed the Court has upheld such proceedings in both the parole-suitability context, *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), and in regard to security-based decisions to place inmates into temporary administrative segregation, *Hewitt v. Helms*, 459 U.S. 460, 476 (1983).

The Sixth Circuit's holding that such "supermax" decisions can only be made if an inmate is afforded factually oriented procedural protections is out of step with this

Court's precedent and the purpose of the Due Process Clause itself. The procedural requirements announced by the Sixth Circuit (such as factually specific notice to the inmate, an opportunity to call witnesses, and a factually specific decision) were modeled after the process required for prison-disciplinary decisions, as announced in *Wolff v. McDonnell*, 418 U.S. 539 (1974). While the *Wolff* procedures are appropriate for a retrospective determination of fact, they are not entirely appropriate for decisions that are subjective and predictive in nature. The Sixth Circuit's prescription for factually oriented procedural requirements will not substantially aid in the accuracy of supermax-housing decisions. Rather, they will encumber prison officials with detailed and time-consuming tasks, contribute to an adversarial atmosphere, and even confuse inmates about the nature of the decision to be made. And all this will come at the further expense of burdening already scarce prison resources.

For these reasons, sufficient process may be provided in supermax-housing determinations through an informal, nonadversary review process as envisioned in this Court's decisions in *Greenholtz* and *Hewitt*. Such process will ensure that an inmate receives an opportunity to participate in the review of his records and to explain any special circumstances that may affect the inquiry. And it will not unduly burden officials' ability to make efficient and accurate security decisions.

ARGUMENT

I. AN INMATE WHO IS CONSIDERED FOR "SUPERMAX" HOUSING RECEIVES DUE PROCESS IF PRISON OFFICIALS ENGAGE IN AN INFORMAL, NONADVERSARY REVIEW OF THE INFORMATION SUPPORTING THE PLACEMENT, INCLUDING WHATEVER STATEMENT THE INMATE WISHES TO SUBMIT.

A. Supermax-housing decisions are subjective in nature, considering myriad factors relevant to predicting an inmate's threat to security.

This case asks what procedures an inmate is entitled to under the Due Process Clause when he is considered for supermax housing. This question should not be separated from the real-life background that informs the decisions at issue. Rather, it should be framed with an understanding of the safety issues that demand officials' necessarily subjective, yet expertly informed judgment in supermax-housing decisions.

1. Prisons are inherently dangerous, and they present intractable security challenges.

By their very nature, prisons are tense at best, sometimes explosive, and always potentially dangerous. *Marchesani v. McCune*, 531 F.2d 459 (10th Cir. 1976). For they are populated by those who have a demonstrated proclivity toward antisocial, criminal, and violent conduct. *See Hudson v. Palmer*, 468 U.S. 517, 526 (1984). For these reasons, prison staff and inmates themselves are faced with the constant threat of physical danger. Indeed, California was tragically reminded of this unfortunate

reality recently when one of its correctional officers—a sixteen-year correctional veteran, a husband, and father of five—was violently stabbed and killed by an inmate with apparent gang ties. Jennifer Warren, *Prison Guard Is Stabbed to Death*, Los Angeles Times, January 11, 2005, at B1. Regrettably, violent assaults against correctional staff are shockingly frequent. A census of state and federal correctional facilities revealed that in 2000, there were 17,952 prisoner assaults against staff, an incidence of 14.6 assaults per 1000 inmates. James J. Stephan & Jennifer C. Karberg, Census of State and Federal Correctional Facilities, 2000, at 10 (2003). Five of these assaults resulted in staff deaths. *Id.* Inmates themselves also face a great risk of violence by other prisoners. In 2000, for instance, 34,355 inmates were assaulted, 28 out of 1000, with 51 deaths. Stephan & Karberg, *supra*, at 10. Often, such incidents between inmates or between inmates and staff unfold into riots, of which there were 1,334 in U.S. prisons from 1990 to 1995. Reid H. Montgomery, Jr., Ph.D. & Gordon A. Crews, Ph.D., A History of Correctional Violence: An Examination or Reported Causes of Riots and Disturbances 68, 72-73 (1998). Other precipitating factors of riots are diverse and include racial tension, mass escape attempts, dissatisfaction with prison food, alcohol and drug-related issues, gangs, and even rumors. *Id.* at 68. Such riots frequently involve dozens, even hundreds of inmates. *Id.* at 79-80. Most last for many hours, and many span days. *Id.* at 77-78. They often involve hostages being taken, and usually result in significant property damage at a minimum. *Id.* at 80-81.

One of the greatest recent challenges in managing the danger of prisons is gang activity. "Anyone familiar with prisons understands the seriousness of the problems

caused by prison gangs that are fueled by actively virulent racism and religious bigotry. Protecting staff from prisoners and prisoners from each other is a constant challenge." *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996). The prison-gang culture is extremely violent: "It includes forced prostitution and armed robbery. It also includes the violence necessary for its enforcement such as attacks on prisoners who interfere with prostitution or tell secrets." Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law after Twenty-five years 1962-1987*, 37 Am. U. L. Rev. 41, 61-62 (1987). In fact, it is commonly known that some gangs require one inmate to kill another in order to become a gang member. *See United States v. Santiago*, 46 F.3d 885, 888 (9th Cir. 1995); *United States v. Silverstein*, 732 F.2d 1338, 1341 (7th Cir. 1984); *see also* David Grann, *The Band: How the Aryan Brotherhood became the most murderous prison gang in America*, The New Yorker 156 (Feb. 16 & 23, 2004).

Prison officials face these troubling realities daily. No easy solutions are evident, yet officials are charged with the task of minimizing, to the extent possible, the threat of violence in order to protect the public, prison staff, and inmates themselves.

2. Many states have established supermax facilities to meet the high-security needs of the nation's most-dangerous prisoners.

In response to such concerns, prison officials historically have placed violent or otherwise disruptive inmates into separate housing units, generally called segregation. *See* Chase Riveland, Supermax Prisons: Overview and General Considerations 1 (1999). But in recent years,

there has emerged a trend toward devoting entire facilities to supermax confinement—highly restrictive and controlled housing utilized for the highest-risk inmates. LIS, Inc., Supermax Housing: A Survey of Current Practice 3-6 (1997). At least thirty states and the federal government operate supermax facilities, with the overwhelming majority of them having opened in the 1980's and 1990's. *See id.*

Because the term "supermax" is often applied to a wide variety of facilities and programs, which handle an equally wide variety of inmate populations among the states, it is difficult to precisely define what a supermax facility is. Yet the following is a generalized definition that fits well within the issues of this case, given that its terms do not encompass disciplinary housing:

> [A] free-standing facility, or a distinct unit within a facility that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or serious and disruptive behavior while incarcerated. Such inmates have been determined to be a threat to safety and security in traditional high-security facilities, and their behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates.

LIS, Inc., *supra*, at 1.

The high degree of control in these facilities, combined with the ability to devote highly qualified and trained staff to monitor the inmates concentrated there, allows administrators to significantly restrict the ability of these inmates to harm other prisoners or staff. *See* Riveland, *supra*, at 16-18. In addition, the concentration of troublesome inmates

allows easier, safer management of general-population prisons. *See id.* at 1.

In supermax units, almost every aspect of inmates' lives is tightly controlled and documented. Riveland, *supra*, at 15. Much is invested into making the buildings themselves extremely secure through the use of "enhanced and extensive security features on locks, doors and perimeters; reinforced walls, ceilings, and floors; and, frequently, the incorporation of advanced electronic systems and technology." *Id.* at 1-2. Many agencies provide specialized training relevant to dealing with such high-risk inmates, and they focus on assigning to the facilities only those officers who have the physical ability, maturity, intelligence, and good judgment to deal with these inmates daily. *See id.* at 16-18; LIS, Inc., *supra*, at 4.

Still, grouping all such facilities under the one term, "supermax," is somewhat misleading because it ignores the many differences in the operation and physical characteristics of these facilities among the states. Indeed, states themselves distinguish their programs by calling them by many different names, including, to name only several: special housing unit, maxi-maxi, maximum control facility, secured housing unit, intensive housing unit, intensive management unit, and administrative maximum penitentiary. Riveland, *supra*, at 5.

Beyond the variety of names, however, there are further, more-fundamental differences. For example, there is variance in the length of time that inmates are held in supermax housing, as well as whether the terms are determinate or indeterminate. Riveland, *supra*, at 4. States have fashioned the physical characteristics of supermax facilities and the prerequisites for housing

inmates in them based on localized needs. *See id.* Thus, some states report no need for supermax beds, while others report a need of up to 20% of their total capacity. *Id.* And while most states allow inmates to be paroled or released from prison while they are still in supermax housing, some do not. LIS, Inc., *supra*, at 4.

3. Supermax-placement decisions depend on the valuable expertise of prison officials for the identification of inmates who present excessive security risks.

The predictive determinations at issue in this case are necessarily subjective in nature, regardless of whether regulations may guide officials to focus on particular factors. For example, when Ohio evaluates a prisoner for supermax housing, it first scores him according to a fixed set of factors including: age, severity of the offense triggering the initiation of reclassification hearings, prior prison experience, prior violent behavior, pre-prison gang activity, and escape attempts. *Austin v. Wilkinson*, 372 F.3d 346, 351 (6th Cir. 2004). Yet even if an inmate scores as a low risk under these factors, officials may override the score on any of several grounds, some of which are entirely subjective and broad reaching. *Id.* Specifically, two seemingly catch-all provisions allow supermax placement if the inmate has either "a chronic inability to adjust to a lower security level" or "an ability to compromise the integrity of [prison] staff." *Id.* Such determinations can be nothing but subjective, and they appear to encompass an extensive range of concerns.

Other states, like California, have more-freeform guidelines, which simply allow non-disciplinary supermax confinement if an inmate is "deemed to be a threat to the safety of others or the security of the institution." Cal. Code Regs., tit. 15, § 3341.5(c)(1) (2003). Although the regulations specifically define validated prison-gang members and associates to qualify under this definition, the choice is otherwise entirely left to the officials' discretion. *Id.*

Thus, prison officials, at least under similar regulations, are permitted to exercise their expert judgment broadly when deciding whether an inmate's presence in a less-secure and less-controlled environment poses a high security risk. The decision may be based on any number of factors, and rightfully should include consideration of the inmate's entire record, his attitude, and his associations with other inmates.

This Court has recognized that prison officials are entitled to great deference in making such decisions because they are well acquainted with the nature of prisoners and the particularities of prison management. *See Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979). Preserving internal order and discipline requires "expertise, comprehensive planning, and the commitment of resources," which prison officials are best positioned to provide. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974). Moreover, this deference is mandated by the constitutional principles of federalism and separation of powers. *See Bell*, 441 U.S. at 548.

B. The intrinsic flexibility of the Due Process Clause allows predictive and subjective decisions to be made within the constructs of informal, nonadversary proceedings, especially when important penological interests are implicated.

The requirements of due process are not strict and inflexible, but instead vary as to time, place, and circumstance. *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). What is constant is that when a protected liberty interest is implicated in any given context, whatever procedures are afforded must provide an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Davis v. Scherer*, 468 U.S. 183, 202 (1984) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Whether particular procedures provide such an opportunity is determined by the balancing test described by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 341-48 (1976). It considers three factors: the individual's interest at stake, the value of available procedural requirements, and the governmental interests involved.

The *Mathews* test is designed in view of the Due Process Clause's intrinsic flexibility. It acknowledges that there is often more than one way by which to provide due process in any given context—a flexibility that allows for experimentation among the states. *See Gerstein v. Pugh*, 420 U.S. 103, 123 (1975). And it recognizes the penological environment's unique needs, which affect the balance of the competing individual and governmental interests. *See Wolff v. McDonnell*, 418 U.S. 539, 560 (1974). For instance, individuals who have been convicted of a crime and sentenced to a term of incarceration are those who should expect their rights to be most restricted. *See Pell v. Procunier*, 417

U.S. 817, 822 (1974). At the same time, the nature of the government's interests are paramount, as the goal is to prevent the prisoner from inflicting further harm on society. *See Hewitt v. Helms*, 459 U.S. 460, 472 (1983).

In applying the *Mathews* balancing test, this Court has affirmed that informal, nonadversary proceedings sufficiently protect due-process rights in the context of subjective and predictive decisions, especially those that implicate penological interests. For example, in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), this Court held that when an inmate has a protected liberty interest in discretionary parole, the Due Process Clause is satisfied if he participates in a properly noticed, informal parole-suitability hearing. At issue there was the adequacy of process that the state provided to inmates in yearly initial-review hearings for parole consideration. *Id.* at 4. At the initial-review hearing, the parole board reviewed "the inmate's entire preconfinement and postconfinement record." No evidence was introduced, but the board interviewed the inmate and considered "any letters or statements that he wishe[d] to present in support of a claim for release." *Id.* At that point, the board could deny parole or send the inmate on for a formal hearing, at which the inmate could present evidence, call witnesses, and be represented by private counsel of his choice. *Id.* at 4-5. The court of appeals had ruled that due process required a formal hearing for every inmate and that the board's decision must include a statement of the evidence relied upon. *Id.* at 14.

This Court reversed, however, holding that it was sufficient that the inmate was given timely notice of the initial hearing, at which he was provided an opportunity "to insure that the records before the Board are in fact the

records relating to his case" and "to present any special considerations demonstrating why he is an appropriate candidate for parole." *Id.* at 15. These procedures alone were constitutionally sufficient, and they did not require the board "to specify the particular 'evidence' in the inmate's file or at his interview" on which it based its decision. *Id.* The Court recognized that an inmate's interest in parole is substantial, but nonetheless held that to require more-adversary procedures would detract from the predictive and subjective nature of the board's decision, which was essential to addressing the serious safety concerns at issue. *See id.* at 16 (describing the decision as "essentially an experienced prediction based on a host of variables").[1]

This Court has also held that informal, nonadversary process is sufficient when an inmate is administratively segregated for the protection of institutional security. In *Hewitt v. Helms*, 459 U.S. 460 (1983), a Pennsylvania inmate had been placed in segregation for seven weeks due to suspicion that he was involved in an inmate uprising. *Id.* at 463-64. The Court determined how much process was due by weighing the inmate's interests against the state's, and by considering whether additional procedures would be beneficial. The Court noted that the inmate did not have a weighty interest in avoiding the confinement to administrative segregation because his freedom, as a prisoner, was already greatly restrained. *Id.* at 473. Moreover, the interest of the state in maintaining

[1] Although *Greenholtz*'s analysis of when a state-created liberty interest arises under the Due Process Clause was discredited by *Sandin v. Connor*, 515 U.S. 472 (1995), *Greenholtz* and other pre-*Sandin* cases like *Hewitt v. Helms*, 459 U.S. 460 (1983), contain informative, still-valid analysis of what process is due once a protected liberty interest has been established. *See Sandin*, 515 U.S. at 484 n.5.

security and insulating him from witnesses was strong. *Id.* Finally, the Court gave substantial consideration to the subjective nature of the officials' decision whether the inmate was a danger to prison security, and it ruled that a formalistic, trial-type process would not have been materially beneficial. *Id.* at 473-74. Thus, the Court simply required that the inmate receive "an informal, nonadversary evidentiary review," consisting of "some notice" of the charges against him and a chance to present his views, even if only in writing. *Id.* at 476.

The subjective, predictive decisions in *Greenholtz* and *Hewitt* are qualitatively different from retrospective determinations of historical fact, and they thus result in substantially different process due, even within the same deference-infused penological atmosphere. For instance, in *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court addressed the process due in prison-disciplinary cases that implicate the loss of sentence credits. In such cases, particular facts are at issue, and the Court thus required procedures that are tailored to ensuring an accurate *factual* determination, including: (1) advance written notice of the alleged violation; (2) a written statement of factual findings; (3) a right to present documentary evidence and to call witnesses unless doing so would unduly risk security; and (4) staff or inmate assistance for illiterate inmates and for complex cases in which the inmate would unlikely be able to collect and present the necessary evidence. *Id.* at 563-66. Likewise, the Court has mandated similar, though slightly more-complex procedures for retrospective factual determinations that concern weightier personal interests, as in the parole-revocation context addressed in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and

the probation-revocation context in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Such procedures, however, are "designed to elicit specific facts" and they "are not necessarily appropriate" to subjective, predictive security determinations. *Greenholtz*, 442 U.S. at 14.

C. Because supermax-housing decisions turn on security-risk assessments that are subjective and predictive, due process is satisfied through informal, nonadversary proceedings.

As both a constitutional and practical matter, the type of process prescribed in *Greenholtz* and *Hewitt* is appropriate in the supermax-housing context. Again, the constitutional test is to weigh the competing individual and governmental interests in light of what procedures would be beneficial to the particular decision to be made. *See Mathews v. Eldridge*, 424 U.S. 319, 341-48 (1976). As discussed below, in both *Greenholtz* and *Hewitt*, the type of decisions at issue were nearly identical to the supermax context, and thus the same type of informal, nonadversary procedure should be appropriate, given that the balances of individual and governmental interests are similar.

1. The nature of subjective supermax decisions is identical to the nature of decisions in the parole and administrative-segregation contexts.

Both parole-suitability and security-based segregation decisions (including supermax decisions) turn "largely on 'purely subjective evaluations and on predictions of future behavior.'" *Hewitt*, 459 U.S. at 474 (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)).

They must consider "what the entire record shows," including the gravity of the commitment offense and the inmate's whole prison experience. *See Greenholtz*, 442 U.S. at 15. Each is "essentially an experienced prediction based on a host of variables," *id.* at 16, although inmate-segregation decisions require additional subjectivity, because they must also consider "the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like." *Hewitt*, 459 U.S. at 474. Indeed, "rumor, reputation, and even more imponderable factors, may suffice to spark potentially disastrous incidents," and officials must have the flexibility to respond to these variables. *Id.*

When a hearing is provided for a supermax-housing determination, it is assumed that its function is to discuss portions of the inmate's record that are relevant to the decision to be made, as in a parole-suitability hearing. In *Greenholtz*, for example, the board interviewed the inmate and considered any letters or statements that he wished to present in his support. *Greenholtz*, 442 U.S. at 4. It reviewed many factors during the hearing, among which were the commitment offense, the inmate's prior social and criminal history, his conduct and attitude during confinement, and both physical and mental examinations. *Id.* at 4 n.1. This is the same type of information that is relevant to the supermax-housing decision, and it is information with which the inmate is intimately familiar. Moreover, to the extent that institutional needs unrelated to the inmate's record will be considered, such matters should be well known by the officials, and the inmate's views ordinarily will be much-less probative.

Thus, it is not crucial for the notice to the inmate to include a list of factors on which the officials might rely. *See Greenholtz*, 442 U.S. at 14 n.6, *discussed in Burns v. United States*, 501 U.S. 129, 155-56 (1991) (Souter, J. dissenting). The inmate already will be able to address matters as they are raised at the hearing, and requiring the officials to cull through the inmate's record before the hearing in order to exhaustively list each possible matter of concern would provide little added benefit to the accuracy of the proceeding, but it would come at much expense to administrative resources. Moreover, as in a parole hearing, the inmate generally will be aware of the subject at issue—his record and any implication of excessive dangerousness that may be inferred from it. *See Hewitt*, 459 U.S. at 474. Sometimes, as in the case of Ohio here, regulations will contain a list of relevant objective factors so that the inmate will have a more-specific idea of the concerns that might be raised. *See Austin v. Wilkinson*, 372 F.3d 346, 351 (6th Cir. 2004). But even when no such list exists, the inmate will not be worse off than the inmates in *Greenholtz*. There, the parole statute listed fourteen specific factors that had to be considered, but they included one catchall that allowed consideration of "[a]ny other factors the board determines to be relevant." *Greenholtz*, 442 U.S. at 11 n.5, 16-18. The inmate could not be sure which of the various factors would be determinative nor whether the primary concern would fall under the catchall category. Yet the inmate's ability to respond to discussions about his own history made the absence of specific substantive notice inconsequential as a constitutional matter. *See Greenholtz*, 442 U.S. at 14 n.6.

It is also the inmate's participation in the hearing, in combination with the subjective nature of the decision, that

makes it unnecessary for officials to issue a decision that specifies "the particular 'evidence' in the inmate's file or at his interview" on which the decision rests. *See Greenholtz*, 442 U.S. at 15. The prisoner's very opportunity to be heard and to participate in the hearing "informs the inmate in what respects he falls short" if the decision is not in his favor. *See id.* at 16. To require a decision that summarizes the evidence would tend to equate the decision to a guilt determination, whereas it is more akin to a discretionary decision to grant or deny probation. *See id.* at 15-16.

A state may decide, however, that it is more in line with its management needs not to provide a hearing, but rather a review based on documents and written submissions from the inmate. As the Court explained in the parole context, "the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the [official] decisionmakers in predicting future behavior." *Greenholtz*, 442 U.S. at 13. Beyond this concern, the decisions at issue here "take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." *See Wolff v. McDonnell*, 418 U.S. 539, 561-62 (1974). Within this highly volatile context, some inmates' rehabilitation may be well served if they receive as much process as reasonably possible. *See id.* at 563. But others might exploit such opportunities to their own ends, and instead require swift and sure action from officials. *Id.* Thus, flexibility in the type of procedures used is warranted and should allow a review similar to that in *Hewitt*, which would provide more notice than the

time-of-hearing notice in *Greenholtz* in order to inform the inmate of the reason for the segregation determination. In *Hewitt*, for example, the inmate was given "some notice" of the primary or precipitating reason that he was considered for segregation, which was reasonable because (as the Court had to assume) he was not present when his record was being discussed by the officials. *Hewitt*, 459 U.S. at 464-65. A similar notice in the supermax context may list that the inmate is considered a danger because of a heinous commitment offense, particular gang associations, suspicion that he was involved in certain disruptive or violent behavior, consistent and repeated disciplinary violations, other similar security issues, or a combination of any such concerns. That type of notice will inform him of the general matters to be considered during the review without requiring that officials parse through inmates' often extensive files in order to compile an exhaustive list of the reasons to be considered and a summary of the evidence.

2. The balance of the individual and governmental interests does not warrant a departure from the informal, nonadversary process that is appropriate for subjective, predictive determinations as previously addressed by the Court.

The weights of the competing governmental and individual interests in this case are quite close to those in *Greenholtz* and *Hewitt*. As to the governmental interests, the goal in both the parole and inmate-segregation contexts (including supermax) is to protect the safety of others, by permitting the inmate to live in a less-secure environment only if it can be done without presenting an

excessive safety risk. *See Hewitt*, 459 U.S. at 474 (comparing administrative-segregation decisions to parole decisions). The segregation decisions, however, have an added governmental interest above the parole context—to safeguard the very volatile prison atmosphere from being disrupted. *See id.*

As to the personal interests, common sense dictates that the interest in parole—and thus freedom from custody altogether—is far stronger than the interest in being free just from supermax confinement. *See Hewitt v. Helms*, 459 U.S. at 468. And in those few states like Ohio where the supermax decision impacts a second interest, the inmate's eligibility for parole, that interest is the same as in *Greenholtz* where it was not deemed sufficient enough to warrant heightened procedures. Neither of these interests, therefore, weigh more heavily in the individual's favor than in *Greenholtz*.[3]

There are also strong similarities between the personal interests here and in *Hewitt*. What is clear is that in neither case does the Due Process Clause, of its own force, protect the individual's interest because it "is not one of great consequence." *Hewitt*, 459 U.S. at 473. "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montayne v. Haymes*, 427 U.S. 236, 242 (1976). And this Court held in *Hewitt*, 459 U.S. at 870, that it "is plain that the transfer

[3] There is some question whether parole eligibility should be considered in this case, however, given that Ohio law creates no liberty interest in parole. *Austin*, 372 F.3d at 361 (citing Ohio Rev. Code § 2967.03; *Wagner v. Gilligan*, 609 F.2d 866, 867 (6th Cir. 1979)).

of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." Thus, any process due can only be the result of a state-created liberty interest in remaining free from discretionary segregation, which is assumed under the question presented in this case, not an interest that is substantial enough to implicate the Due Process Clause of its own force. *See Sandin v. Conner*, 515 U.S. 472, 483-84 (1995).

To be sure, the confinement in *Hewitt* was for just seven weeks, and cumulative supermax confinement terms may be much longer, depending on a state's particular system. But if "some sort of periodic review of the confinement is provided," where officials consider "the facts relating to a particular prisoner" in conjunction with their "general knowledge of prison conditions and tensions," this should largely eliminate the importance of this distinction. *See Hewitt*, 459 U.S. at 477 n.9. Moreover, although *Hewitt* dealt with administrative segregation, rather than supermax confinement, the conditions at issue in *Hewitt* should not be discounted. The Court assumed that they were as restrictive as disciplinary segregation and imposed "severe hardships" such as: denial of access to vocational, educational, recreational, and rehabilitative programs; restrictions on exercise; and confinement to a cell for lengthy periods of time. *Id.* at 463 n.1, 467 n.4.

For these reasons, the similarities among *Greenholtz*, *Hewitt*, and supermax decisions are strong enough—especially in relation to the nature of the security decision to be made—that any slight differences in the individual interests do not warrant more-complex procedures.

D. The more-adversary procedures required by the Sixth Circuit are ill matched to subjectively oriented supermax decisions and impose unnecessary burdens on prison administrators.

Despite the similarities among *Greenholtz*, *Hewitt*, and supermax decisions, the Sixth Circuit below mandated a set of more-complex procedures that track those announced in *Wolff v. McDonnell*, 418 U.S. 539 (1974). *See Austin v. Wilkinson*, 372 F.3d 346, 358 (6th Cir. 204). This is so even though *Wolff* was a prison-disciplinary case, in which particular facts were at issue, not a subjective judgment—and in which the inmate's interest was in sentence credits that affected the length of his sentence, as opposed to mere segregated confinement. *See id.*

Although the requirements prescribed by the Sixth Circuit were modeled after *Wolff*, they are not identical. In fact, in some respects they are significantly more stringent in the context of a supermax-placement decision. Specifically, the Sixth Circuit required:

(1) "an exhaustive list of the reasons to be considered for placement and a summary of the evidence to be presented;"

(2) a right to present documentary evidence and to call witnesses unless doing so would unduly risk security;

(3) a record of the proceeding and if any reliance is made on confidential witnesses, a disclosure of as much information as possible;

(4) notice of the inmate's right to administratively appeal, along with a notice of any

newly considered confidential testimony within that review, an opportunity to present documentary evidence, and a "detailed and specific justification for the decision;" and

(5) semi-annual written and oral notification of the inmate's progress toward security-level reduction, listing specific conduct that is necessary to reduce levels and the amount of time reduction will take.

Austin, 372 F.3d at 358; 360 n.14; *Austin v. Wilkinson*, 204 F. Supp. 2d 1024, 1028 (N.D. Ohio 2002).

These procedures are not necessary or even beneficial in the context of subjective, predictive supermax decisions because they—like the *Wolff* procedures they are modeled after—are designed to resolve factual disputes. *See Greenholtz*, 442 U.S. at 14. Indeed, the inclusion of factually oriented procedures in the supermax context would be counterproductive by distracting both the inmate and decisionmakers from the proper focus, which is an evaluation of the inmate's overall ability to interact peacefully. As the Court stated when it declined to apply *Wolff*-type procedures to the administrative-segregation context, "an administrator's judgment probably would be hindered" by "trial-type procedural safeguards." *Hewitt*, 459 U.S. at 474 & n.7. "Prison officials, wary of potential legal liability, might well spend their time mechanically complying with cumbersome, marginally helpful procedural requirements, rather than managing their institution wisely." *Id.* at 474 n.7.

Moreover, correctional agencies have a strong interest in avoiding being encumbered by such extensive, detailed procedures. The task of providing an inmate with an exhaustive list of reasons to be considered and a summary of the evidence to be presented is excessively burdensome,

and it serves no essential function that is not already met by the informal, nonadversary procedures in *Greenholtz* and *Hewitt*. The inmate already will be advised, either in the hearing or in a notice, of the general reasons that he came up for review. This will enable him to discuss his prison history in light of the primary factors to be considered and to present any special considerations regarding the threat he poses. If he is ultimately placed into supermax housing, the hearing or the notice will have sufficiently advised him of the concerns at issue, and thus the decision need not include a detailed and specific justification. Indeed, no such detailed decision was required even in the parole context, where the individual interests are at least as significant. *Greenholtz*, 442 U.S. at 15-16.

The requirement that witnesses be allowed is also misplaced in this context. In prison, the transportation of witnesses, and even making them available by telephone, demands scarce prison resources, while the traditional and most-valuable benefit of a witness—to provide testimony about disputed facts—would be nonexistent. And last, although periodic review is appropriate, listing the specific factors for reduction of custody classification is analogous to the detailed decision that *Greenholtz* rejected. Plus, such notice may not be as desirable as the Sixth Circuit expected. It could give the inmate an unrealistic expectation of release into the general population despite the fact that conditions there may change, or other issues may arise, making it necessary to keep the inmate in supermax housing.

Aside from considerations of how useful the *Wolff*-type procedures are in the supermax context, it should not be ignored that in *Wolff*, the weight of the personal interests were significantly higher, which contributed to the determination of how much process was due. *Wolff*, 418 U.S. at

561 (calling the interest one of "considerable importance"). In *Wolff*, sentence credits were implicated, and thus so too was the length of the sentence. *Id.* That interest is certainly greater than the interest in avoiding supermax confinement, which entails a mere change in the level of custody restriction, rather than an elimination of confinement altogether. *See Hewitt*, 459 U.S. at 468. Further, even when parole eligibility is affected by supermax classification, an interest in parole eligibility is not as significant as an interest in sentence credits. Sentence credits create an absolute expectation of release by an earlier date, whereas parole eligibility only qualifies the inmate for a parole-suitabilty hearing, at which he may or may not be granted release. That decision typically is quite discretionary. *See Greenholtz*, 442 U.S. at 13.

For these reasons, due process should be satisfied in the supermax context if an inmate receives an informal, nonadversary determination of his dangerousness. Such review provides adequate opportunity for inmates to participate in the decision making process. Moreover, it recognizes the limited constitutional interest that inmates have in avoiding supermax confinement and the strong governmental interests in efficiently separating dangerous inmates from the general population of prisons.

CONCLUSION

For the above-stated reasons, the *amici* states urge this Honorable Court to reverse the decision below.

Respectfully submitted,

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